Amarjit Singh Sidhu v Tan Siew Eng & Anor

HIGH COURT (MALACCA) – ORIGINATING SUMMONS NO 88 OF 1983
WAN YAHYA J
16 MARCH 1988

Succession – Executorship expenses not included in earlier court order – Application for supplemental order to ratify these expenses – Whether court has power to correct such omissional irregularity

Civil Procedure – Supplemental order – Application for – Omission to include executorship expenses in earlier court order – Whether court has power to ratify irregularity

This appeal originates from part of an earlier order made by the court wherein it was ordered that a portion of a disputed estate property be distributed to the beneficiaries in proportion to their shares. The sum so distributed became the subject of this dispute when it was disclosed that the defendants, as executors and trustees, had made certain deductions. As the defendants had overlooked to secure the provision for these expenditures in the earlier order of the court, they sought for a supplemental order to regularize these payments. The main issue before the court was whether the court was empowered to make the supplemental order as prayed.

Held, allowing the application: The defendants would have in normal circumstances been entitled to deduct all the expenses incurred by them as trustees. There is no doubt that the court would have, on the basis of the evidence now produced, sanctioned the expenditures if so requested. The court therefore has the power to ratify by supplemental order a mere omission by the defendants to obtain prior approval for what would have otherwise been lawful expenditure.

Cases referred to
1 *Sharp* v *Lush* (1879) 10 Ch D 468 (refd)
2 *Re Scowby* [1897] 1 Ch 741 (follid)
3 *Ford-Hunt* v *Raghbir Singh* [1973] 1 WLR 738 (follid)

Kang Ai Lin (Miss) for the applicants/defendants.
Sukhdev Singh for the respondent/plaintiff.

Cur Adv Vult

Wan Yahya J: This appeal originates from part of an earlier order made by this court on 26 February 1985 wherein it was ordered that a portion of the disputed estate property, ie the difference between the sum of $359,291.29, together with accrued interest and the sum of $280,000 be distributed to the beneficiaries in proportion to their shares.

Payments to the beneficiaries were, however, withheld for a considerable period until 26 June 1986 when the plaintiff took out a summons-in-chambers for an order to the defendants to comply with the earlier order. According to the defendants, payments had been postponed to enable them to obtain full interest on maturity of the money which had been placed in fixed deposits. They claimed that the plaintiff's solicitor was aware of the reason. Anyway distribution to the beneficiaries was eventually made on 2 January 1987. The sum so distributed, however, became another subject of dispute when it was disclosed that the defendants had made a deduction from the balance sum of $111,219.29 (the difference between $391,219.29 and $280,000).

As the defendants had overlooked to secure the provision for these expenditures in the earlier order of the court dated 26 February 1985, they sought a supplemental order from this court to regularize these payments. Their application was objected to by the plaintiff on the ground that the consent of the original plaintiff should have first been obtained, and in the event of her refusal the court's permission, before incurring the expenses.

The two issues emanating from the arguments are firstly, whether the expenses claimed by the defendants had been properly incurred and secondly, whether the court is empowered to make the supplemental order as prayed.

The first issue involves the deductions made for the following expenditure:

(a) bill no 9/83 dated 24 February 1983 for $506.50 from Coopers & Lybrand marked 'ESC-11';
(b) bill no 14/85-86 dated 23 September 1985 for $6,180.50 from Coopers & Lybrand marked 'ESC-12';
(c) bill no 18/85 dated 12 April 1985 for $2,200 from Barbinder & Co Sdn marked 'ESC-13';
(d) bill no 54/85 dated 19 June 1985 for $1,000 from Barbinder & Co Sdn marked 'ESC-14';
(e) bill no 3/85-86 dated 23 September 1985 for $1,256 from Barbinder & Co Sdn marked 'ESC-15';
(f) letter dated 23 August 1985 from Coopers & Lybrand advising that the estimated tax payable by the estate of Ee Yew Kim, deceased for the years of assessment 1976 to 1985 is the sum of $9,291.06 marked 'ESC-16'.

Except for the first item the plaintiff disputed the rest of these expenditures but beyond saying that the payments were unlawful, they were unable to show if the sums involved were incorrect, unreasonable or improperly incurred. A case in point with regard to (b) to (e) in the present predicament is *Sharp* v *Lush*[1] in which it was held that:

> The term 'executorship expenses' in a will means expenses incident to the proper performance of the duty of an executor, and includes costs incurred by executors in obtaining the advice of solicitors or counsel as to the distribution of their testator's estate; also the costs of the executors and other parties in an action, whether instituted by the executors themselves or by a beneficiary, for the administration of the testator's personal estate; also the testator's funeral expenses; also expenses incurred by the executors for the protection of specific legacies – as, for instance, for warehousing furniture specifically bequeathed – pending the distribution of the assets; and payments by the executors in

discharge of debts falling due from the testator's estate after his death – as, for instance, rent due after the testator's death for a house of which he was tenant from year to year.

As regards the amount disclosed in (f), I am of the view that the sum was rightly withheld from the plaintiff and the other beneficiaries pending the computation of income tax payment. Of course as executors and trustees, the defendants must exercise due care to see that the money wherever possible be invested in short term deposits.

The second issue appertains to the power of this court to ratify by way of supplemental order, a mere omissional irregularity by the defendants to obtain prior approval for what would have otherwise been lawful expenditure. As observed earlier, the defendants would have in normal circumstances been entitled to deduct all the expenses incurred by them as trustees. Somehow they missed the significance of this issue at the time when the order for distribution was made. There is no doubt that I would have, on the basis of the evidence now produced, sanctioned the expenditures if so requested. In *Re Scowby*,[2] it was held that the High Court has jurisdiction to make upon proof of new facts an order supplemental to an original order. Similarly in *Ford-Hunt* v *Raghbir Singh*,[3] Brightman J observed (at p 740) that:

> There is no doubt, if the plaintiffs had asked, an inquiry as to damages would have been added to the order for specific performance. The question is whether an inquiry can be directed now.

These cases are not directly on fours with our present application but to my mind they are nevertheless persuasive authorities to move me into making this supplemental order.

Whatever inconvenience caused to the plaintiff in this case has been compensated by costs.

Order accordingly.

Solicitors: *Chooi & Co; Jagjit Singh & Co.*

Reported by *Ng Sheau Jiuan*

Development & Commercial Bank Bhd v Tengku Noone Aziz bin Tengku Mahmood & Anor

HIGH COURT (KUALA LUMPUR) – CIVIL SUIT NO C23-2759-86
SITI NORMA YAAKOB J
28 JULY 1988

Banking – Guarantor sued for principal debtor's debt on overdraft facilities – Interest rate on overdraft increased without guarantor's consent or knowledge – Whether permissible by terms of overdraft – 'Until further notice' – Meaning of

The second defendant, who was being sued as a guarantor, appealed against an O 14 judgment obtained by the plaintiff. The second defendant contended, inter alia, that the increase in the rate of interest from 15% to 16% pa was made without his consent and knowledge.

Held, dismissing the appeal: (1) The term on the rate of interest payable states '15% pa until further notice'. The words 'until further notice' can only mean that the rate is subject to increase or decrease at the discretion of the plaintiff. There is no provision as to prior notice or that the consent of the second defendant needs to be sought before the plaintiff can exercise its right to revise the rate of interest.

(2) Clauses 1 and 15 of the guarantee give the plaintiff the power to treat the second defendant as a principal debtor and since the second defendant has not, until the appeal, raised any objection to the amount claimed, he had not raised any triable issue as to warrant upsetting the senior assistant registrar's order.

Teh Meng Teck for the second defendant/appellant.
VP Pradhan for the plaintiff/respondent.

Cur Adv Vult

Siti Norma Yaakob J: The second defendant in this suit is sued as a guarantor and on 12 February 1986, the senior assistant registrar allowed the plaintiff's application under O 14 and entered judgment against him for the sum of $1.25 million being the limit of the guarantee together with interest at 16% pa from 25 February 1986 to date of realization and costs. Against this decision, he has now appealed.

At the hearing before me, the second defendant sought to introduce a letter dated 19 September 1987 from Bank Negara wherein all banks in the country were encouraged to reduce their base lending rates in view of the economic recession in the country.

I had disallowed reliance on this letter, as it is persuasive in nature only and has no force of law whatsoever. Moreover it was issued after the cause of action had arisen and after the writ was filed.

Although in his affidavit, the second defendant raised a number of issues, before me he was quite content to confine them to only the following: